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Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

NEW YORK, PETITIONER

v.

DARRELL WILLIAMS, EFRAIN HERNANDEZ, CRAIG LEWIS, AND EDWIN RODRIGUEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI*

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This opinion is uncorrected and subject to revision before publication in the New York Reports.

No. 11
The People &c.,
Respondent,
v.
Darrell Williams,
Appellant.

No. 12
The People &c.,
Respondent,
v.
Efrain Hernandez,
Appellant.

No. 13
The People &c.,
Respondent,
v.
Craig Lewis,
Appellant.

No. 14
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Appellant,
v.
Patricia D. Marks, Monroe County Court Judge,
Respondent.

No. 15
The People &c.,
Respondent,
v.
Edwin Rodriguez,
Appellant.

Case No. 11:
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David M. Cohn, for respondent.

Case No. 12:
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Martin J. Foncello, for respondent.

Case No. 13:
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Martin J. Foncello, for respondent.

Case No. 14:
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Case No. 15:
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OPINION BY: GRAFFEO, J.:

In 1998, as part of Jenna's Law, the Legislature adopted Penal Law § 70.45, which directs that postrelease supervision is a mandatory component of all determinate prison sentences. We subsequently held that a sentencing court's failure to pronounce postrelease supervision during sentencing proceedings results in an illegal sentence that cannot be administratively corrected by the Department of Correctional Services (see Matter of Garner v New York State Dept. of Correctional Servs., 10 NY3d 358, 360, 889 N.E.2d 467, 859 N.Y.S.2d 590 [2008]). The Legislature responded in 2008 by enacting Correction Law § 601-d to provide a mechanism for courts to consider resentencing defendants serving determinate sentences without court-ordered postrelease supervision terms. In these appeals, we consider whether there are statutory or constitutional impediments to imposing postrelease supervision at resentencing on defendants who have completed their terms of imprisonment and been released into the community.

I. The History of Postrelease Supervision

The intent of the Legislature in adopting Jenna's Law was to abolish parole and institute determinate terms of imprisonment for certain felony offenses (see L 1998, ch 1). A major component of this statutory scheme required that every determinate sentence must also pro-vide for postrelease supervision (PRS) (see Penal Law §

70.45 [1]). The implementation of mandatory PRS spurred a series of cases in this Court, beginning with People v Catu (4 NY3d 242, 825 N.E.2d 1081, 792 N.Y.S.2d 887 [2005]), in which we held that where PRS is a "direct consequence" of a conviction, a defendant seeking to plead guilty must be informed that a period of PRS constitutes part of his sentence if the plea is to be valid under the knowing, voluntary and intelligent standard (see id. at 244-245). Thus, a defendant who was not advised about a term of PRS prior to pleading guilty may seek vacatur of the plea.

Shortly after Catu, the United States Court of Appeals for the Second Circuit declared in Earley v Murray (451 F3d 71 [2006], cert denied sub nom. Burhlre v Early, 551 U.S. 1159, 127 S. Ct. 3014, 168 L. Ed. 2d 752 [2007]) that a defendant is entitled to habeas corpus relief in federal court if correction officials administratively imposed PRS that was not ordered by a court. A few weeks later, our decision in People v Van Deusen (7 NY3d 744, 853 N.E.2d 223, 819 N.Y.S 2d 854 [2006]) dealt with a defendant who requested the withdrawal of her plea prior to sentencing because she had not been told about PRS as part of her negotiated plea bargain. The sentencing court had attempted to correct this oversight by combining the five-year mandatory term of PRS with a reduced prison sentence so that the total prison term would be less than the maximum 15-year sentence that the defendant had been promised. We rejected this corrective action, determining that a Catu error could not be rectified in this manner because, when the defendant pleaded

guilty, "she did not possess all the information necessary for an informed choice among different possible courses of action" and, therefore, her plea was involuntary (id. at 746).

Then, in People v Lource (8 NY3d 541, 869 N.E.2d 18, 838 N.Y.S.2d 18 [2007]), we recognized that a Catu error may be raised on direct appeal even if a defendant did not preserve the issue by moving to withdraw a plea prior to sentencing (as Van Deusen had done) or seeking vacatur of the conviction after sentencing (see id. at 545-546). And in People v Hill (9 NY3d 189, 879 N.E.2d 152, 849 N.Y.S.2d 13 [2007], cert denied __ U.S. __, 128 S. Ct. 2430, 171 L. Ed. 2d 257 [2008]), we reiterated that a Catu error requires vacatur of a defective guilty plea since the error affects the defendant's due process rights (see id. at 193).

In April 2008, we issued the decisions in Matter of Garner v New York State Dept. of Correctional Servs. (10 NY3d 358, 889 N.E.2d 467, 859 N.Y.S.2d 590) and People v Sparber (10 NY3d 457, 889 N.E.2d 459, 859 N.Y.S.2d 582). These cases dealt with the legality of the administrative imposition of PRS by the Department of Correctional Services (DOCS) in situations where the sentencing courts had not pronounced PRS as part of the sentences. In Garner, we ruled that DOCS did not have the authority to add PRS to an inmate's sentence because "CPL 380.20 and 380.40 collectively provide that only a judge may impose a PRS sentence" (10 NY3d at 360). And in Sparber, we held that imprisoned defendants who raised the

pronouncement issue on direct appeal, but did not seek vacatur of their pleas, were not entitled to have PRS expunged from their sentences as this would result in non-PRS sentences that contravened the statutory mandate for determinate sentences (see Penal Law § 70.45 [1]). Consequently, we concluded that the appropriate remedy for defendants like Sparber was a resentencing proceeding that could provide for the proper inclusion of PRS (see 10 NY3d at 471-472).

In the aftermath of these cases, the Legislature sought to deal with the significant number of incarcerated individuals whose status had been affected by the Catu and Garner/Sparber decisions. Section 70.85 was enacted (L 2008, ch 141, § 2) to address "cases in which a determinate sentence was imposed . . . and was required by law to include a term of postrelease supervision, but the court did not explicitly state such a term when pronouncing sentence." The statute allows a resentencing court to reimpose the originally pronounced determinate prison sentence without PRS if the District Attorney so consents. The purpose of this statute was to "avoid the need for pleas to be vacated when the District Attorney consents to re-sentencing without a term of PRS" (Governor's Approval Mem, Bill Jacket, L 2008, ch 141, at 13-14, reprinted in 2008 McKinney's Session Laws of NY, at 1653). In addition, section 601-d of the Correction Law was added to permit DOCS to notify sentencing courts that PRS had not been properly imposed in certain cases (these defendants are referred to as "designated persons") and to have

these defendants returned to the original sentencing courts for modification of their sentences to include PRS.

Most recently, in May 2009, we decided another case where the defendant pleaded guilty but was not adequately informed about PRS. In People v Boyd (12 NY3d 390, 908 N.E.2d 898, 880 N.Y.S.2d 908), the People mentioned PRS at the plea proceeding but the court stated that it did not have to order it because PRS was a mandatory part of the sentence. The court then asked the defendant if he understood that PRS was mandatory and the defendant responded in the affirmative. However, the defendant was not advised of the specific duration of his PRS term at the time of his plea, nor did the court formally impose a term of PRS as part of the sentence. We determined that these deficiencies rendered the plea involuntary and that defendant did not need to preserve this issue by a post-allocution motion to withdraw his plea (see id. at 393). Although the People requested that the defendant be resentenced without PRS under the procedure adopted in Penal Law § 70.85 in order to avoid vacatur of the guilty plea, we declined to approve this remedy in Boyd, finding it premature. We explained:

> "This corrective action should not be entertained at this time because the constitutionality of this new provision and its applicability to this case have not been sufficiently developed for our review. . . . the issue of whether the

> deficiency in the plea allocution can be rectified by granting defendant specific performance of the plea agreement -- a determinate sentence without imposing a term of PRS -- should be determined by Supreme Court in the first instance. We therefore remit this case to Supreme Court to give the People the opportunity to litigate their argument regarding the applicability of Penal Law § 70.85 and for defendant to assert any constitutional challenges to the operation of the statute" (id. at 394).

Unlike the defendant in Boyd who requested vacatur of his plea, we now have before us five defendants who are not challenging the validity of their convictions but instead raise a variety of statutory and constitutional issues regarding resentencing under Correction Law § 601-d. In each of these cases, defendants received determinate sentences that did not include a term of PRS. Following our decisions in Garner and Sparber, DOCS initiated resentencing proceedings under Correction Law § 601-d so that PRS could be formally pronounced in each case. The defendants here do not seek reversal of their convictions because they have completed their originally-imposed prison sentences and have been released from custody by DOCS. Before addressing their contentions, we review the pertinent facts of each case.

II. The Defendants

People v Darrell Williams

In 2004, defendant Darrell Williams agreed to enter a guilty plea to assault in the second degree in exchange for a promised prison sentence of three years, to be followed by three years of PRS. The plea was accepted by Supreme Court but the court did not formally pronounce the term of PRS during the sentencing proceeding. DOCS nevertheless conditionally released Williams to PRS in September 2006.

In May 2007, Williams was reincarcerated for violating PRS. Following our decision in Garner, DOCS notified the sentencing court of its failure to properly impose PRS. Williams claimed that resentencing exceeded the court's jurisdiction and would violate his Double Jeopardy and Due Process protections. Supreme Court concluded that it had the inherent authority to correct the original sentence because it was illegal in the absence of a period of PRS. The court did, however, order that Williams be immediately released from custody on the rationale that he could not have violated PRS before it was a proper component of his sentence. The Appellate Division affirmed (59 AD3d 172, 871 N.Y.S.2d 908 [1st Dept 2009]) and a Judge of this Court granted Williams leave to appeal (12 NY3d 823, 908 N.E.2d 938, 881 N.Y.S.2d 30 [2009]).

People v Efrain Hernandez

Defendant Efrain Hernandez pleaded guilty to burglary in the second degree and was sentenced to seven years imprisonment. PRS was not discussed during the plea proceeding or at sentencing. DOCS administratively imposed five years of PRS and Hernandez was conditionally released from prison in December 2005.

Hernandez violated PRS and was sent back to prison. After the enactment of Correction Law § 601-d, DOCS notified the sentencing court that Hernandez was a designated person for the purpose of resentencing. Hernandez opposed resentencing on statutory and constitutional grounds.

Supreme Court determined that there were no legal impediments to the resentencing procedure under Correction Law § 601-d because the original sentence was illegal without a term of PRS and Hernandez could not have had a reasonable expectation of finality in that sentence once DOCS informed him that PRS was required. At resentencing, in lieu of PRS, the court offered Hernandez the option to withdraw his guilty plea and proceed to trial, but he declined this offer and was resentenced to the original prison term plus five years of PRS.

The Appellate Division affirmed (59 AD3d 180, 872 N.Y.S.2d 455 [1st Dept 2009]), holding that a sentencing court has the inherent power to correct an illegal sentence even if the correction occurs more

than one year after conviction. The court also determined that a defendant cannot have a legitimate expectation of finality in an illegal sentence and that the imposition of PRS was not fundamentally unfair. A Judge of this Court granted Hernandez leave to appeal (12 NY3d 817, 908 N.E.2d 932, 881 N.Y.S.2d 24 [2009]).

People v Craig Lewis

Defendant Craig Lewis was indicted for burglary, assault and criminal contempt after he assaulted his ex-girlfriend and subsequently entered her home without permission in violation of an order of protection. Unlike the other defendants in these appeals, Lewis declined to plead guilty and exercised his right to a jury trial. Although the jury acquitted Lewis of assault, he was convicted of burglary and two counts of criminal contempt. The sentencing court ordered an aggregate prison sentence of five years but did not impose PRS.

DOCS administratively added PRS and, after Lewis was released from confinement, the sentencing court was notified that Lewis was a designated person qualifying for resentencing pursuant to Correction Law § 601-d. Lewis interposed various objections to resentencing, which were rejected by the court that resentenced defendant to five years of PRS. The Appellate Division affirmed (60 AD3d 425, 873 N.Y.S.2d 489 [1st Dept 2009]), and a Judge of this Court granted Lewis leave to appeal (12 NY3d 818, 908 N.E.2d 934, 881 N.Y.S.2d 26 [2009]).

Matter of Echevarria v Marks

Petitioner Danny Echevarria pleaded guilty to first-degree rape and other offenses in return for an aggregate prison sentence of five years. PRS was not discussed during the plea proceeding and it was not made part of the sentence, although defense counsel referenced PRS during the sentencing proceeding. Before Echevarria was released from prison, he signed a DOCS certificate acknowledging a term of PRS. Thereafter, he violated the terms of PRS on several occasions and was returned to prison. Since People v Sparber (10 NY3d 457, 889 N.E.2d 459, 859 N.Y.S.2d 582 [2008]) was decided while Echevarria was in custody for a PRS violation, DOCS notified the sentencing court that Echevarria should be resentenced.

Petitioner commenced a CPLR article 78 proceeding against the sentencing judge (respondent Marks), seeking relief in the nature of prohibition to preclude resentencing on jurisdictional and constitutional grounds. In dismissing the petition, the Appellate Division reasoned that, even if resentencing was beyond the court's jurisdiction, Echevarria could not pursue discretionary prohibition relief because he had an adequate remedy at law -- a direct appeal from his resentencing (57 AD3d 1479, 869 N.Y.S.2d 837 [4th Dept 2008]). We granted leave to appeal (12 NY3d 828, 908 N.E.2d 914, 881 N.Y.S.2d 7 [2009]).

People v Edwin Rodriguez

Defendant Edwin Rodriguez pleaded guilty to second-degree burglary in exchange for seven years imprisonment. PRS was not discussed during his plea allocution or at sentencing. DOCS later informed Rodriguez that he was required to serve five years of PRS and he was conditionally released from prison in early 2007. Later that year, Rodriguez was arrested for violating PRS.

DOCS identified Rodriguez as a designated person and initiated the resentencing process. Rodriguez rejected the court's offer to withdraw his guilty plea, raised no objection to the imposition of PRS and was resentenced to the original prison term, with a five-year term of PRS. The Appellate Division affirmed (60 AD3d 452, 874 N.Y.S.2d 117 [1st Dept 2009]) and a Judge of this Court granted leave to appeal (12 NY3d 928, 912 N.E.2d 1091, 884 N.Y.S.2d 710 [2009]).

III. Statutory Challenges to the Imposition of PRS at Re-sentencing

In these appeals, defendants[1] -- who have completed serving their sentences of imprisonment and have been released from prison -- assert several statutory challenges to the imposition of PRS in a resentencing proceeding. Although they recognize

[1] We use this term to refer to all of the appellants in these cases, including petitioner Echevarria.

that courts have the "inherent power" to correct illegal sentences, defendants contend that this authority cannot be exercised more than one year after the declaration of the original sentence under CPL 440.40. Defendants claim that such resentencings are further subject to the prohibition in CPL 380.30 against unreasonable delays. They also argue, in the alternative, that Correction Law § 601-d allows a resentencing court the option to decline to resentence a defendant, even if the People do not so consent, and that the failure of a sentencing court to consider this option constitutes an abuse of discretion requiring the nullification of PRS.

As a general principle, a sentence cannot be changed once a defendant begins to serve it; however, this applies only if the "sentence is in accordance with law" (CPL 430.10). Our precedent has long recognized that courts have the inherent authority to correct illegal sentences (see e.g. People v Richardson, 100 NY2d 847, 852-853, 799 N.E.2d 607, 767 N.Y.S.2d 384 [2003]; People v Minaya, 54 NY2d 360, 364, 429 N.E.2d 1161, 445 N.Y.S.2d 690 [1981], cert denied 455 U.S. 1024, 102 S. Ct. 1725, 72 L. Ed. 2d 144 [1982], quoting Bohlen v Metropolitan El. Ry. Co., 121 NY 546, 550-551, 24 N.E. 932 [1890]). Because PRS is a mandatory component of a sentence for a crime punishable by a determinate prison term (see Penal Law § 70.45 [1]), there is no dispute that defendants' original sentences that omitted the imposition of terms of PRS were illegal.

Contrary to defendants' assertions, CPL 440.40 -- which allows the People to move to set aside an invalid sentence within one year of its imposition -- does not impose a one-year limitation on a court's authority to rectify an illegal sentence. As we stated in People v Wright (56 NY2d 613, 615, 435 N.E.2d 1088, 450 N.Y.S.2d 473 [1982]), CPL 440.40 "is designed to restrict the People's ability to move to set aside an illegal sentence" and the text of this statute does not "place a similar restriction on the court's inherent ability to correct its own errors." Defendants object to this precedent but the cases on which they rely -- Carlisle v United States (517 U.S. 416, 116 S. Ct. 1460, 134 L. Ed. 2d 613 [1996]) and United States v Smith (331 U.S. 469, 67 S. Ct. 1330, 91 L. Ed. 1610 [1947]) -- address specific time limits contained in the federal Rules of Criminal Procedure that do not pertain to the inherent ability of New York courts to modify illegal sentences. In any event, we recently reaffirmed Wright in People v Sparber (10 NY3d at 471 n 6). Consequently, these resentencing proceedings were not barred by virtue of the fact that they occurred more than one year after defendants were initially sentenced.

We also reject the claim that resentencing courts have the option of declining to impose PRS regardless of whether the People consent to that disposition. Penal Law § 70.85 specifies that in cases where PRS was required but not explicitly pronounced at sentencing, the matter may be returned for resentencing pursuant to Correction Law § 601-d, and the court may decide to reimpose the original determinate sentence without PRS "only

on consent of the district attorney" (Penal Law § 70.85). Hence, a court may decline to impose PRS during resentencing only when the People issue the statutorily required consent under Penal Law § 70.85.

Finally, defendants submit that the sentencing courts in these cases lost jurisdiction to resentence them under CPL 380.30 due to the length of the delays between the original sentencings and the resentencing proceedings. Certainly, the statute requires that sentences must be imposed "without unreasonable delay" (CPL 380.30 [1]), and in furtherance of that statutory directive, we have held that an unexplained delay of several years between conviction and sentencing results in the loss of jurisdiction over a defendant (see People v Drake, 61 NY2d 359, 366, 462 N.E.2d 376, 474 N.Y.S.2d 276 [1984]; People ex rel. Harty v Fay, 10 NY2d 374, 379, 179 N.E.2d 483, 223 N.Y.S.2d 468 [1961]). Here, even assuming that CPL 380.30 applies, there was no violation of the statute because defendants were resentenced within a reasonable time after DOCS notified the courts that these defendants were "designated persons" under Correction Law § 601-d.

Accordingly, defendants have identified no statutory barriers to the correction of the illegal sentences that were originally imposed.

IV. Constitutional Claims

Defendants next challenge the imposition of PRS as a violation of the Double Jeopardy Clause of

the federal constitution because the resentencing proceedings occurred after they were released from prison after completing their terms of imprisonment. According to defendants, once they were freed from confinement, they were entitled to a "legitimate expectation of finality" in the sentences that had been originally issued by the sentencing courts. And if a legitimate expectation of finality attached, further governmental supervision in the form of PRS amounted to the imposition of multiple punishments, which is prohibited by the Fifth Amendment.

The Double Jeopardy Clause of the Fifth Amendment states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." The United States Supreme Court has construed this language to cover three distinct protections: (1) the right to be free from a second trial following an acquittal for the same crime; (2) the right to be free from a second trial following a conviction for the same offense; and (3) the right not to be punished more than once for the same crime (see e.g. United States v DiFrancesco, 449 U.S. 117, 129, 101 S. Ct. 426, 66 L. Ed. 2d 328 [1980]; see also People v Biggs, 1 NY3d 225, 228-229, 803 N.E.2d 370, 771 N.Y.S.2d 49 [2003]). The third category -- referred to as the "multiple punishments" doctrine -- is relevant in these cases.

One of the first cases regarding the protection against multiple punishments was Ex Parte Lange (85 U.S. 163, 18 Wall [85 U.S.] 163, 21 L. Ed. 872 [1873]). Defendant Lange had been sentenced to a

year in jail and a $200 fine despite the fact that the crime was punishable by either imprisonment up to one year or a fine between $10 and $200. Once the defendant paid the fine, he sought a writ of habeas corpus but the sentencing court resentenced him instead to one year in jail without any fine. The US Supreme Court ruled that the imposition of the second sentence violated the Double Jeopardy Clause because, after paying the fine specified in the original sentence, no other penalty could be legally imposed on the defendant. The Court reasoned that requiring him to continue serving jail time resulted in more than one punishment for the same offense (id. at 176).

Following Ex Parte Lange, it was unclear whether double jeopardy prevented a sentence from being increased after a defendant began a prison term (see generally DeMaggio v Coxe, 70 F2d 840, 840 [2d Cir 1934]). Bozza v United States (330 U.S. 160, 167, 67 S. Ct. 645, 91 L. Ed. 818 [1947]) clarified that the commencement of an illegal sentence did not prevent a court from correcting the illegality by increasing the total sentence. In Bozza, the sentencing error was promptly corrected the same day the original sentence was declared.

The US Supreme Court subsequently extended this rule beyond same-day corrections in United States v DiFrancesco (449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 [1980]). There, the Court held that the protection against multiple punishments prevents a sentence from being

increased once the defendant has a legitimate expectation in the finality of the sentence (see id. at 135-136). Because federal law allowed the government to request that the sentence be set aside on appeal, the Supreme Court concluded that the defendant's legitimate expectation of finality did not attach "until the [government's] appeal is concluded or the time to appeal has expired" (id. at 136). Until then, the defendant is on notice that the sentence may be increased at any time before those events occur (see id.).

In the cases before us, the correction of the illegal sentences did not occur until well after the expiration of the People's time to seek a statutory remedy (see CPL 440.40 [1]; 460.10 [1] [a], [c]). Although the US Supreme Court has yet to weigh the legitimate expectation of finality principle in a situation akin to the matters presented in these appeals, the federal Courts of Appeals have considered similar issues in a context analogous to PRS. In United States v Rourke (984 F2d 1063 [10th Cir 1992]) and United States v Warner (690 F2d 545, 555 [6th Cir 1982]), for example, the defendants were required to serve a period of "special parole" after release from prison. The failure to impose special parole at sentencing resulted in illegal sentences. Once these errors were corrected via resentencing, the defendants raised Double Jeopardy challenges to the imposition of the more severe sentences on the ground that they had a legitimate expectation of finality in the original sentences. The federal courts rejected this argument by defendants who had not completed their sentences when the

resentencing proceedings were brought, reasoning that these individuals "cannot acquire a legitimate expectation of finality in a sentence which is illegal, because such a sentence remains subject to modification" (United States v Rourke, 984 F2d at 1066; see also United States v Warner, 690 F2d at 555 [collecting cases]).

But a different rationale has been applied by the federal courts where defendants have completed their original sentences of imprisonment. Some courts have held that a reasonable expectation of finality arises upon completion of the imposed sentence, resulting in the attachment of jeopardy precluding resentencing (see e.g. United States v Silvers, 90 F3d 95, 101 [4th Cir 1996] ["once a defendant fully serves a sentence for a particular crime, the Double Jeopardy Clause's bar on multiple punishments prevents any attempt to increase thereafter a sentence for that crime"]; United States v Daddino, 5 F3d 262, 265 [7th Cir 1993] [completion of incarceration portion of sentence precluded any increase of it]; United States v Arrellano-Rios, 799 F2d 520, 524-525 [9th Cir 1986]; Oksanen v United States, 362 F2d 74, 80 [8th Cir 1966] [applying the rule to a completed term of probation]; see also Hernandez v Quarterman, 340 Fed Appx 210, 215 [5th Cir 2009]), unless the government's time to seek correction of the sentence remains pending at the time of release (see United States v Rico, 902 F2d 1065, 1068-1069 [2d Cir 1990], cert denied sub nom. Baron v United States, 498 U.S. 943, 111 S. Ct. 352, 112 L. Ed. 2d 316 [1990]; see also United States v Cook, 890 F2d 672, 675 [4th Cir 1989]). Other

federal courts have suggested that the resentencing of a defendant who has been released from confinement would be unconstitutional (see e.g. DeWitt v Ventetoulo, 6 F3d 32, 35-36 [1st Cir 1993], cert denied 511 U.S. 1032, 114 S. Ct. 1542, 128 L. Ed. 2d 193 [1994]; United States v Lundien, 769 F2d 981, 986-987 [4th Cir 1985], cert denied 474 U.S. 1064, 106 S. Ct. 815, 88 L. Ed. 2d 789 [1986]; Breest v Helgemoe, 579 F2d 95, 101 [1st Cir 1978], cert denied 439 U.S. 933, 99 S. Ct. 327, 58 L. Ed. 2d 329 [1978]).[2]

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[2] Some state courts have indicated that the Double Jeopardy Clause applies in similar situations (see State v Hardesty, 129 Wash 2d 303, 314-315, 915 P2d 1080, 1086 [1996], March v State, 109 NM 110, 112, 782 P2d 82, 84 [1989]; State ex rel. Hill v Parsons, 194 W Va 688, 692, 461 SE2d 194, 198 [1995]; Mayhin v State, 884 So 2d 1174, 1175 [Fla Ct App 2004]; cf. State v Pascal, 108 Wash 2d 125, 135, 736 P2d 1065, 1071 [1987] [no expectation of finality in completed sentence because the state appealed the below guidelines, 90-day jail sentence]). In addition, the Ohio Supreme Court -- in a situation somewhat comparable to PRS -- has held that the failure to impose a mandatory term of "postrelease control" may be corrected through resentencing if the error is discovered before the original sentence has been completed (see State ex rel. Cruzado v Zaleski, 111 Ohio St 3d 353, 358, 2006 Ohio 5795, 856 NE2d 263, 268 [2006]; State v Bloomer, 122 Ohio St 3d 200, 206, 2009 Ohio 2462, 909 NE2d 1254, 1261 [2009] [resentencing prior to completion of original illegal sentence does not violate Double Jeopardy or Due Process]), but cannot be rectified after a defendant has finished serving the sentence originally imposed by the court (see Hernandez v Kelly, 108 Ohio St 3d 395, 401, 2006 Ohio 126, 844 NE2d 301, 306 [2006]; see also State v Bezak, 114 Ohio St 3d 94, 97, 2007 Ohio 3250, 868 NE2d 961, 964 [2007]; State v Simpkins, 117 Ohio St 3d

(Continued...)

We find this federal precedent persuasive and conclude that, after release from prison, a legitimate expectation in the finality of a sentence arises and the Double Jeopardy Clause prevents reformation to attach a PRS component to the original completed sentence. As we have noted, New York courts have the inherent authority to correct illegal sentences and this power extends be-yond the one-year period for the People to seek resentencing in the court of original jurisdiction (see section III, supra). Moreover, the People are allowed to move to set aside or appeal a sentence on the ground that it is not authorized by law, which may delay final consideration of a case well beyond the one-year term specified in CPL 440.40. Since criminal defendants are charged with knowledge of the relevant laws that apply to them (see e.g. United States v DiFrancesco, 449 U.S. at 136), they are presumed to be aware that a determinate prison sentence without a term of PRS is illegal and, thus, may be corrected by the sentencing court at some point in the future (see generally People v Sparber, 10 NY3d at 471 [remedy for an imprisoned defendant upon whom PRS was not imposed is resentencing for pronouncement of a legal sentence]). So long as an illegal sentence is subject to correction, a defendant cannot claim a legitimate expectation that the originally imposed, improper

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420, 429, 2008 Ohio 1197, 884 NE2d 568, 578 [2008] [reserving judgment on applicability of the Double Jeopardy Clause to completed sentences], cert denied ___ U.S. ___, 129 S. Ct. 463, 172 L. Ed. 2d 332 [2008])

sentence is final for all purposes (see United States v Fogel, 829 F2d 77, 87, 264 U.S. App. D.C. 292 [DC Cir 1987]).

Yet, there must be a temporal limitation on a court's ability to resentence a defendant (see generally DeWitt v Ventetoulo, 6 F3d at 34-35) since criminal courts do not have perpetual jurisdiction over all persons who were once sentenced for criminal acts. Even where a defendant's sentence is illegal, there is a legitimate expectation of finality once the initial sentence has been served and the direct appeal has been completed (or the time to appeal has expired). In these situations, the sentences are beyond the court's authority and an additional term of PRS may not be imposed. With the caveats we have identified, in a case where PRS was not formally pronounced by the sentencing court pursuant to CPL 380.20, we hold that the Double Jeopardy Clause prohibits a court from resentencing the defendant to the mandatory term of PRS after the defendant has served the determinate term of imprisonment and has been released from confinement by DOCS.

The People argue that this principle should not apply in these cases because defendants were released from custody after serving only 6/7ths of their terms of imprisonment (as contemplated by the statutory scheme of PRS, which withholds credit for the unserved portion of a prison term until PRS is successfully completed) (see Penal Law § 70.45 [5] [a]). They further contend that, before defendants were released from prison, defendants were aware

that they had to serve PRS -- as evidenced by written acknowledgments executed regarding PRS requirements (see Penal Law § 70.45 [3]; Executive Law § 259-g [2]; 9 NYCRR 8003.1 [c]) -- so any expectations defendants may have had regarding the finality of the originally-imposed illegal sentences were neither legitimate nor reasonable. The People also note that defendant Williams agreed at the time he pleaded guilty that he would have to serve three years of PRS, further undermining his expectation of finality.

It is true that defendants were released from prison after serving less than the entire term of their determinate sentences and the records in these cases reveal that some of the defendants did sign documents pertaining to PRS before their release. Nevertheless, these facts do not alter our analysis. Garner (10 NY3d 358, 889 N.E.2d 467, 859 N.Y.S.2d 590 [2008]) and Sparber (10 NY3d 457, 889 N.E.2d 459, 859 N.Y.S.2d 582 [2008]) were both premised on the fundamental notion that "sentencing is a uniquely judicial responsibility" (id. at 470). Thus, the administrative imposition by DOCS of any additional penalty other than that issued by the sentencing court is a nullity (see Garner, 10 NY3d at 362) and cannot negate a defendant's reasonable expectation that, once completed, the imposed sentence will not be increased. State law permitted defendants' release after having served substantial portions of their determinate prison terms. At that point, they could not have been reincarcerated for a potential violation of PRS because PRS had not been validly required by a court in the first instance (see

e.g. People ex rel. Lewis v Warden, Otis Baum Correctional Ctr., 51 A.D.3d 512, 513, 858 N.Y.S.2d 141 [1st Dept 2008]; People ex rel. Gerard v Kralik, 51 AD3d 1045, 1046, 858 N.Y.S.2d 771 [2d Dept 2008]; Matter of State of New York v Randy M., 57 AD3d 1157, 1159, 870 N.Y.S.2d 490 [3d Dept 2008], lv denied 11 NY3d 921 [2009]; People ex rel. Foote v Piscotti, 51 AD3d 1407, 1408, 857 N.Y.S.2d 515 [4th Dept 2008]).[3] This is equally true for defendant Williams, notwithstanding his acknowledgment of PRS during his plea proceeding, because the court did not include PRS in its pronounced sentence. Here, defendants' release from incarceration erected a Double Jeopardy Clause barrier to any subsequent upward modifications of their original sentences.

Our dissenting colleague, Judge Smith, believes that DiFrancesco virtually "eliminate[d] the applicability of the [Double Jeopardy] clause to sentencing proceedings" (Smith, J., dissenting op at 3). As we have demonstrated, however, this position has been rejected by most courts that have considered DiFrancesco (see supra, at 18-19). In addition, Judge Pigott's dissent relies on Bozza for the proposition that a defendant can never have a legitimate expectation of finality in an illegal sentence. To the contrary, the defendant in Bozza was resentenced on the same day the illegal sentence had been imposed, not years later after having served the originally-imposed sentence, as

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[3] This analysis has no application to a person who, for example, is erroneously released early by DOCS.

defendants in these cases have done. Judge Pigott's reliance on Thompson v United States (495 F2d 1304 [1st Cir 1974]), Caille v United States (487 F2d 614 [5th Cir 1973]) and United States v Rourke (984 F2d 1063 [10th Cir 1992]), as well as People v Minaya (54 NY2d 360, 429 N.E.2d 1161, 445 N.Y.S.2d 690 [1981]) (see Pigott, J., dissenting op at 3 and n 1), is similarly misplaced since none of those defendants had served their sentences and been released from confinement. Simply put, none of the precedent cited in this dissent involves persons who were released from incarceration after having served their sentences and were later hauled back into court to face an increase in sentence, not as a result of anything they did, but because of errors committed by the sentencing courts years earlier.[4]

To summarize, once a defendant is released from custody and returns to the community after serving the period of incarceration that was ordered by the sentencing court, and the time to appeal the sentence has expired or the appeal has been finally determined, there is a legitimate expectation that the sentence, although illegal under the Penal Law, is final and the Double Jeopardy Clause prevents a

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[4] It is also inaccurate for this dissent to characterize the legitimate expectation of finality as accruing as soon as the one-year period for the People to move to set aside the sentence expires (see Pigott, J., dissenting op at 5), especially since we have previously rejected such a time restriction on two occasions (see People v Sparber, 10 NY3d at 471 n 6, People v Wright, 56 NY2d at 615).

court from modifying the sentence to include a period of postrelease supervision.[5]

V. Remaining Issues

There remain a few additional points to address. Defendant Rodriguez failed to raise any objections at his resentencing. As a result, his Double Jeopardy argument is not preserved for review. He nevertheless believes that the issue may be considered by us because a resentencing proceeding that contravenes the Double Jeopardy Clause results in a mode of proceedings error or the imposition of an illegal sentence, both of which are exempt from the preservation requirement. Rodriguez alternatively maintains that defense counsel's failure to challenge the court's authority to conduct the resentencing proceeding resulted in a deprivation of his right to the effective assistance of counsel.

We have recognized a narrow exception to preservation where a mode of proceedings error affects a court's jurisdiction and power over a defendant (see e.g. People v. Gray, 86 NY2d 10, 21, 652 N.E.2d 919, 629 N.Y.S.2d 173 [1995]). Constitutional Double Jeopardy violations generally

[5] Because defendants have asserted a meritorious Double Jeopardy claim, it is unnecessary for us to address their arguments premised on the Due Process and Ex Post Facto Clauses, or the state constitution. In addition, we note that the constitutional issue identified in People v. Boyd (12 NY3d at 394) is not at issue in these appeals.

constitute mode of proceedings errors (see e.g. People v Biggs, 1 NY3d at 231) but that rule is most often applied where the People attempt to initiate a second prosecution following an acquittal or conviction.

The People urge that preservation is necessary under People v Gonzalez (99 NY2d 76, 781 N.E.2d 894, 751 N.Y.S.2d 830 [2002]), where we concluded that an argument premised on the multiple punishments doctrine must be preserved. The issue in Gonzalez was whether the defendant could be convicted and receive concurrent sentences for more than one offense based on a single act. Our determination rested solely on an examination of the relevant Penal Law statutes to assess whether the Legislature intended to authorize cumulative punishments in that situation. Because there were no fundamental jurisdictional overtones to this inquiry, we determined that the claimed deficiency was not a mode of proceedings error (see id. at 82; see also People v Biggs, 1 NY3d at 231 [recognizing that a statutory Double Jeopardy claim is not exempt from preservation]).

In light of the fact that we are deciding in these appeals that the Double Jeopardy Clause protects a defendant from being resentenced to a more severe punishment after serving the sentence of imprisonment and being released into the community, it necessarily follows that the resentencing courts did not retain jurisdiction to modify the original judgments that were entered in these cases. Because Rodriguez's Double Jeopardy

claim implicates a fundamental mode of proceedings, it is reviewable absent preservation.[6]

Petitioner Echevarria, unlike the other defendants, sought to prevent resentencing by commencing an article 78 proceeding seeking prohibition relief. DOCS requested that the court schedule a hearing in order to provide the parties an opportunity to be heard on the issue prior to the court considering whether it would be appropriate to resentence Echevarria.

Prohibition may be used to preclude a government officer from acting in excess of the officer's jurisdiction (see e.g. Matter of Rush v Mordue, 68 NY2d 348, 354, 502 N.E.2d 170, 509 N.Y.S.2d 493 [1986]) and it is an "extraordinary remedy" that is ordinarily unavailable if a "grievance can be redressed by ordinary proceedings at law or in equity or merely to prevent error which may be readily corrected on appeal" (Matter of Lee v County Ct. of Erie County, 27 NY2d 432, 437, 267 N.E.2d 452, 318 N.Y.S.2d 705 [1971] [internal quotation marks omitted], cert denied 404 U.S. 823, 92 S. Ct. 46, 30 L. Ed. 2d 50 [1971]; see also Garner, 10 NY3d at 362). It is also generally inapplicable if the petition raises nonjurisdictional issues, even if they are otherwise unreviewable (see Matter of Pirro

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[6] In light of this conclusion, it is unnecessary for us to consider his alternative argument that he was deprived of his right to the effective assistance of counsel at the resentencing proceeding.

v Angiolillo, 89 NY2d 351, 355, 675 N.E.2d 1189, 653 N.Y.S.2d 237 [1996]).

Although Echevarria raises a Double Jeopardy claim to resentencing premised on the sentencing court acting in excess of its jurisdiction, the record in this case does not indicate that the judge had considered whether it was appropriate to impose a term of PRS. Here, the court's order scheduled this matter "for consideration of whether the inmate should be re-sentenced, and that the Clerk arrange for counsel for both parties to appear" on a specific date. Based on these facts, there was no need to seek prohibition relief before the court determined "the lawfulness of the sentence that was imposed" or whether it would accept the served sentence without a term of PRS. Echevarria's article 78 petition should therefore be dismissed.

* * *

In conclusion, in People v Williams, People v Hernandez, People v Lewis and People v Rodriguez, the Double Jeopardy Clause afforded defendants protection against more severe sentences after they had satisfied the original judgments of the respective sentencing courts and been released from incarceration at the termination of their sentences of imprisonment. The imposition of PRS at resentencing was impermissible and they are entitled to be discharged from PRS. In Matter of Echevarria v Marks, the courts below properly dismissed the article 78 petition.

Accordingly, in cases 11, 12, 13 and 15, the orders of the Appellate Division should be reversed, the resentences vacated and the original sentences reinstated. In case 14, the judgment of the Appellate Division should be affirmed, without costs.

SMITH, J. (dissenting in Williams, Hernandez, Lewis and Rodriguez, and concurring in Echevarria):

I agree with Judge Pigott that the addition of postrelease supervision (PRS) terms to defendants' sentences did not violate either the State or federal Double Jeopardy Clause (NY Const Art I, § 6 ["No person shall be subject to be twice put in jeopardy for the same offense"]; US Const, Amendment V ["nor shall any person for the same offense be twice put in jeopardy of life or limb"]). I disagree both with Judge Pigott and the majority in that I do not think the decisive question is whether defendants had a "legitimate expectation of finality" in the sentences they originally received. That, to me, is a circular question: the prisoners' expectations were legitimate if protected by the Double Jeopardy Clauses, and not otherwise. I find more useful guidance in the Supreme Court's leading decision on the application of double jeopardy principles to sentencing, United States v DiFrancesco (449 US 117, 101 S Ct 426, 66 L Ed 2d 328 [1980]), which convinces me that the Double Jeopardy Clauses have no application to the sort of case now before us.

My colleagues take the DiFrancesco decision as creating a "legitimate expectation of finality" test for double jeopardy upon resentencing (maj op at 16;

op of Pigott, J. at 4). (They evidently assume, and I join them in assuming, that we should follow DiFrancesco in interpreting both the State and federal Double Jeopardy Clauses.) I think they read something into the case that is not there. In fact, DiFrancesco never uses the precise phrase "legitimate expectation of finality". It does say that a sentenced prisoner has no "expectation of finality" when his sentence is, by statute, subject to a prosecutor's appeal (449 U.S. at 136, 139), and that his "legitimate expectations are not defeated" when such an appeal results in an increased sentence (id. at 137); but these are observations about the situation the Court faced in DiFrancesco, not formulations of a general rule. DiFrancesco never says or implies that "legitimate expectation of finality" is the test for deciding when a resentencing violates double jeopardy.

Much more important to the DiFrancesco decision than any catchphrase is the Court's explanation of the very limited effect that the Double Jeopardy Clause has on the power of courts to increase sentences. The essence of the Court's holding is that sentences and acquittals are different for double jeopardy purposes; the Double Jeopardy Clause does not render a sentence final and unreviewable, as it does an acquittal. "[A] sentence does not have the qualities of constitutional finality that attend an acquittal" (id. at 134). The Double Jeopardy Clause as interpreted in DiFrancesco "does not provide the defendant with the right to know at any specific moment in time what the exact limit of

his punishment will turn out to be" (id. at 137 [emphasis added]).

The DiFrancesco Court identified only one double-jeopardy limitation on sentences: "a defendant may not receive a greater sentence than the legislature has authorized" (id. at 139). The Court found this principle to be established by Ex parte Lange (85 U.S. 163, 21 L. Ed. 872 [1873]). In Lange, the petitioner was granted relief because he had been sentenced to both a fine and imprisonment, though the applicable statute permitted only one or the other. The DiFrancesco Court said the Lange holding is "not susceptible of general application" (449 U.S. at 139).

Nothing in DiFrancesco suggests that the Double Jeopardy Clause itself has "general application" to sentencing outside of the rare Lange-type situation. Justice Brennan, dissenting in DiFrancesco, seemingly read that case, as I do, nearly to eliminate the applicability of the clause to sentencing proceedings. Indeed, Justice Brennan found implicit in the DiFrancesco majority's holding a rejection of the idea that completion of a defendant's originally-imposed sentence is critical for double jeopardy purposes -- an idea espoused by the majority here. "Under the Court's view, there is no double jeopardy bar to imposition of additional punishment by an appellant [sic] court after the defendant has completed service of the sentence imposed by the trial court" (id. at 152 n.15 [Brennan, J., dissenting] [emphasis in original]).

In short, my colleagues and I read DiFrancesco very differently. There is (non-binding) precedent for both readings. Some courts have, like today's majority and Judge Pigott, found a "legitimate expectation of finality" test in DiFrancesco (United States v Silvers, 90 F3d 95, 101 [4th Cir 1996]; United States v Arellano-Rios, 799 F2d 520, 523-24 [9th Cir 1986]); others have read DiFrancesco as largely eliminating double jeopardy issues in resentencing cases (DeWitt v Ventetoulo, 6 F3d 32, 34 [1st Cir 1993]; United States v Lundien, 769 F2d 981, 986 [4th Cir 1985]). I think the latter cases read DiFrancesco correctly.

In concluding that the Double Jeopardy Clauses are largely irrelevant to a situation like the present one, I do not imply that either the State or federal Constitution gives courts carte blanche to increase defendants' sentences whenever they choose, up to the maximum permitted by statute. Rather, I follow the DeWitt and Lundien courts in concluding that due process, not double jeopardy, sets limits - though not narrow or rigid ones - on courts' resentencing power. The flexible approach that courts customarily use in interpreting Double Jeopardy Clauses - avoiding arbitrary cut-offs, but addressing "the familiar due process question of how much is too much" (DeWitt, 6 F3d at 36) - is better suited than double jeopardy analysis to identifying and correcting the few cases in which a belated sentencing enhancement is inconsistent with fundamental fairness. Such a case will be "the very rare exception to the general rule that courts can,

after sentence, revise sentences upward to correct errors" (id.).

If the issue is understood as one of fundamental fairness, the cases now before us are easy ones. There is nothing fundamentally unfair about what happened to these defendants. Their sentences were enhanced, not by increasing their prison terms, but by adding terms of PRS required by state statute - components of their sentences inadvertently omitted when the sentences were pronounced. Those who did not know before they were originally sentenced that they were supposed to be subject to PRS soon found out, or at least had ample opportunity to do so. As Judge Pigott demonstrates, "[a]ll the evidence suggests that from the moment they entered the prison system, if not before, defendants expected to serve postrelease supervision" (op of Pigott, J. at 6). None of them, so far as the record shows, complained or expressed surprise when they were (illegally) subjected to PRS on their release. None of these defendants is remotely comparable to the petitioner whose due process claim was upheld in DeWitt. DeWitt had been granted a suspension of his life imprisonment sentence, had been released on parole, and had established a business and personal relationships in the community, only to be given the completely unexpected news that the suspension was a mistake and he was subject to a life sentence after all.

Since the resentencings of defendants in People v Williams, People v Hernandez, People v Lewis and People v Rodriguez violated neither their

double jeopardy nor their due process rights, I would affirm the orders from which they appeal. In Echevarria v Marks, I concur in the result.

PIGOTT, J. (dissenting in Williams, Hernandez, Lewis and Rodriguez, and concurring in Echevarria):

According to the majority, a defendant who knows that the sentence he received is illegal, because it contravenes Penal Law § 70.45, nevertheless acquires a legitimate expectation in the finality of his sentence simply by virtue of being released from prison. Because that holding conflicts with United States Supreme Court jurisprudence, I dissent.

To begin with, I agree with the majority that there was no statutory impediment to the imposition of postrelease supervision on the defendants in these cases, after they had completed their terms of imprisonment (see maj opn at 14). But I cannot accept the majority's conclusion that imposing postrelease supervision on defendants in Correction Law § 601-d resentencing proceedings violates their rights under the Double Jeopardy Clause of the United States Constitution.

The majority concedes that, "[s]ince criminal defendants are charged with knowledge of the relevant laws that apply to them, they are presumed to be aware that a determinate prison sentence without a term of [postrelease supervision] is illegal and, thus, may be corrected by the sentencing court at some point in the future" (maj opn at 20 [citation

omitted]). But the majority fails to follow these propositions to their logical conclusion. A defendant who knows that the sentence he was given is illegal and is subject to correction cannot claim to have a legitimate expectation that the sentence will remain uncorrected. There can be no reasonable expectation of finality in a sentence that is less severe than required by the law.

The Supreme Court expressly held in Bozza v United States (330 U.S. 160, 67 S. Ct. 645, 91 L. Ed. 818 [1947]), that a defendant has no legitimate expectation of finality in an unlawful sentence. In Bozza, the Court ruled that a court does not violate a defendant's double jeopardy protections when it merely "set[s] aside what it had no authority to do and substitute[s] directions required by the law" (330 U.S. at 167). Bozza was convicted of operating an illegal still, a crime carrying a mandatory sentence of a $100 fine and a term in prison. The trial court originally sentenced the defendant only to the term of imprisonment. When the court realized its mistake, it resentenced defendant, imposing the $100 fine as well as the prison term. The Supreme Court charged the defendant with knowledge that the court lacked the authority to impose only imprisonment, and held that he had no legitimate expectation of finality in the original, illegal sentence (id.) "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner" (330 U.S. at 166-167; see also Jones v Thomas, 491

U.S. 376, 387, 109 S. Ct. 2522, 105 L. Ed. 2d 322 [1989]).[1]

Applying Bozza, it follows that the defendants in the cases before us cannot claim a legitimate expectation of finality in their sentences. All are, as the majority concedes, presumed to be aware that their determinate prison sentence lacking postrelease supervision are illegal and, thus, subject to correction (see maj opn at 20). Therefore, none may claim objectively good reason to believe that his sentence would not be corrected. And defendant Williams can have had no expectation of finality, for another reason; he acknowledges that he agreed in his plea agreement to serve postrelease supervision. A defendant who was "mistakenly sentenced to a lesser term than he agreed to" does not "acquire a vested interest in the error so that it would be unfair, under the double jeopardy clause, to correct the error and make the defendant serve out the term of his own sentencing agreement" (People v Minaya,

[1] Although the majority suggests that Bozza should be limited to situations in which the error is "promptly" corrected (maj opn at 16; see also maj opn at 23), federal courts have given Bozza a much wider interpretation. "The full import of Bozza is that a trial court not only can alter a statutorily-invalid sentence in a way which might increase its severity, but must do so when the statute so provides" (Thompson v United States, 495 F2d 1304, 1306 [1st Cir 1974] [omission of statutorily mandated special parole term from sentence raised during appeal process]; see also e.g. Caille v United States, 487 F2d 614, 615 [5th Cir 1973] [same]; United States v Rourke, 984 F2d 1063, 1066 [10th Cir 1992] [same]).

54 NY2d 360, 366, 429 N.E.2d 1161, 445 N.Y.S.2d 690 [1981]; see also People v Woodrow Williams, 87 NY2d 1014, 1015, 666 N.E.2d 174, 643 N.Y.S.2d 469 [1996]).

In United States v DiFrancesco (449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 [1980]), the Supreme Court held that a defendant was charged with knowledge that his sentence was subject to appeal by the government -- under a federal statute permitting sentence enhancement of "dangerous special offenders" -- and therefore could not have a legitimate expectation of finality (DiFrancesco, 449 U.S. at 136, 139). DiFrancesco did not involve correction of an illegal sentence, but its rationale applies here, where the defendants are charged with knowledge that their sentences, if illegally imposed, are subject to correction (see generally United States v Crawford, 769 F2d 253, 257 [5th Cir 1985]).

Given the Supreme Court's holdings in Bozza and DiFrancesco, it is clear that a defendant has a legitimate expectation in the finality of his sentence -- that is, a reasonable expectation that the sentence he received will not be modified so as to become more severe -- only when he has objective reason to believe that it will not be changed or corrected. The majority's holding that "there is a legitimate expectation of finality once the initial sentence has been served and the direct appeal has been completed (or the time to appeal has expired)" (maj opn at 21) fundamentally misunderstands the concept of an expectation of finality in double jeopardy jurisprudence. A defendant cannot acquire

a legitimate expectation of finality from the mere fact that he has been released from prison. Factual or legal circumstances may exist that would undermine a reasonable person's expectation in the finality of the sentence imposed, even after release.

Moreover, the majority's requirement of two conditions for the attachment of a legitimate expectation of finality -- the completion of "the initial sentence" and the completion of the direct appeal or time to appeal (maj opn at 21) -- implies that an incarcerated defendant can-not acquire a legitimate expectation of finality until his prison sentence is complete. This is also incorrect. Where circumstances do not undermine the expectation, a defendant will acquire a legitimate expectation of finality in his sentence as soon as the appeal process is complete and the one-year period has expired during which the People may move to set aside his sentence as invalid under CPL 440.40 (compare DiFrancesco, 449 U.S. at 136 [expectation of finality attaches when time for government appeal has expired]). That period may expire before he is released.

The practical aspects of the litigation before us support the view that the defendants had no expectations of finality in their sentences. It is noteworthy that not one defendant has alleged that he was not informed of the postrelease supervision component of his sentence upon commencement of his imprisonment (see Correction Law 803 (1)[d]), and not one denies that he was informed of the postrelease supervision before being conditionally

released (see Penal Law 70.45 [3]; Executive Law 259-g [2]). Yet, defendants did not seek to challenge their postrelease supervision when their prison sentences started or even when they were released. All the evidence suggests that from the moment they entered the prison system, if not before, defendants expected to serve postrelease supervision.

The majority insists that "there must be a temporal limitation on a court's ability to resentence a defendant," citing DeWitt v Ventetoulo (6 F3d 32, 34-35 [1st Cir 1993]) (maj opn at 20-21). But DeWitt did not involve double jeopardy protections at all. That case held that a tardy, procedurally unique reinstatement of a life sentence, six years after it was suspended, violated a defendant's due process rights, and the First Circuit went out of its way to note that although "notions of fundamental fairness do place some temporal limit on later increases in sentence . . . [o]nly in the extreme case can a court properly say that the later upward revision of a sentence, made to correct an earlier mistake, is so unfair that it must be deemed inconsistent with fundamental notions of fairness embodied in the Due Process Clause" (6 F3d at 35 [emphasis added]). The majority does not reach defendants' due process arguments, and I will not address them here, except to say that if the majority believes that notions of fundamental fairness embodied in the Due Process Clause mandate that an expectation of finality originates as soon as a defendant's initial sentence has been served, it should say so.

In any case, the statement that "there must be a temporal limitation on a court's ability to resentence a defendant" (maj opn at 20) again misconstrues the notion of legitimate expectation of finality, which is constrained not by time, but by whether or not it would be reasonable for defendant to believe that his sentence will not be modified. If, in a particular case, a defendant cannot be hauled back to prison ten years after he has been re-leased, on the ground of an error in his sentence, that may be because defendant cannot reasonably be charged with having known that his sentence was in any way defective. Or, more likely, it may be because of fundamental fairness considerations embodied in due process rights. It is never merely because of a temporal limitation on resentencing that emerges from double jeopardy protections.

Selecting a defendant's conditional release date to be the time when an expectation of finality attaches is simply arbitrary. "The Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be. Congress has established many types of criminal sanctions under which the defendant is unaware of the precise extent of his punishment for significant periods of time, or even for life, yet these sanctions have not been considered to be violative of the Clause." (DiFrancesco, 449 U.S. at 137.)

Finally, the Supreme Court has often had occasion to repeat that "a sentence does not have the qualities of constitutional finality that attend an

acquittal" (DiFrancesco, 449 U.S. at 134, citing Chaffin v Stynchcombe, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 [1973]; North Carolina v Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 [1969]; Bozza; and Stroud v United States, 251 U.S. 15, 40 S. Ct. 50, 64 L. Ed. 103 [1919]; see also Caspari v Bohlen, 510 U.S. 383, 391-392, 114 S. Ct. 948, 127 L. Ed. 2d 236 [1994]). Re-sentencing "does not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence" (DiFrancesco, 449 U.S. at 136). We should be more cautious before we deviate from the Supreme Court's "traditional refusal to extend the Double Jeopardy Clause to sentencing" (Caspari, 510 U.S. at 392).

For these reasons, I dissent in People v Williams, People v Hernandez, People v Lewis, and People v Rodriguez, and I concur in result in Matter of Echevarria v Marks.

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Case Nos. 11, 12, 13, 15: Order reversed, resentence vacated and defendant's original sentence reinstated. Opinion by Judge Graffeo. Chief Judge Lippman and Judges Ciparick, Read and Jones concur. Judge Smith dissents and votes to affirm in an opinion. Judge Pigott dissents in a separate opinion.

Case No. 14: Judgment affirmed, without costs. Opinion by Judge Graffeo. Chief Judge Lippman and Judges Ciparick, Read and Jones concur. Judge

Smith concurs in result in an opinion. Judge Pigott concurs in result in a separate opinion.

Decided February 23, 2010

PEOPLE V. DARRELL WILLIAMS
59 A.D.3d 172
February 5, 2009
Appellate Division, First Department

COUNSEL

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (David M. Cohn of counsel), for respondent.

OPINION

[**172] Judgment of resentence, Supreme Court, New York County (Bruce Allen, J.), rendered June 20, 2008, resentencing defendant to a term of 3 years with 5 years' post-release supervision, unanimously affirmed.

After defendant completed his prison sentence and began serving a term of PRS that was improperly imposed by the Department of Correctional Services, the court conducted a resentencing proceeding (see Correction Law § 601-d) and properly imposed PRS. We reject defendant's double jeopardy argument, as well as his other challenges to the resentencing (see People v Hernandez,) AD3d , 59 A.D.3d 180, 872 N.Y.S.2d 455, 2009 N.Y. App. Div. LEXIS 646, 2009 NY Slip Op 631, decided simultaneously herewith).

[* 173] Defendant also challenges the original sentencing court's failure to pronounce the DNA databank fee orally. Since this appeal is from the resentencing, which was limited to the imposition of PRS, defendant may not raise any issue regarding imposition of fees (see People v Williams, 6 NY2d 193, 195-96, 160 N.E.2d 456, 189 N.Y.S.2d 149 [1959]). Furthermore, defendant's original appeal from the underlying judgment (26 AD3d 903, 810 N.Y.S.2d 95 [2006], lv denied 6 NY3d 899, 850 N.E.2d 681, 817 N.Y.S.2d 634 [2006]) failed to raise any such issue. In any event, the imposition of the databank fee by way of court documents was lawful (see People v Harris, 51 AD3d 523, 857 N.Y.S.2d 562 [2008], lv denied 10 NY3d 935, 892 N.E.2d 407, 862 N.Y.S.2d 341 [2008]).

PEOPLE V. EFRAIN HERNANDEZ
59 A.D.3d 186
February 5, 2009
Appellate Division, First Department

COUNSEL.

Robert S. Dean, Center for Appellate Litigation, New York (Barbara Zolot of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Martin J. Foncello of counsel), for respondent.

OPINION.

[**180] Judgment of resentence, Supreme Court, New York County (Michael J. Obus, J.), rendered October 17, 2008, resentencing defendant to a term of 7 years with 5 years' post-release supervision, unanimously affirmed.

In December, 2005, having served six years of the seven-year determinate term imposed upon his conviction of burglary in the second degree, defendant was granted conditional release and began to serve an administratively-imposed mandatory five-year term of post-release supervision. Thereafter, in People v Sparber (10 NY3d 457, 889 N.E.2d 459, 859 N.Y.S.2d 582 [2008]) and Matter of Garner v New York State Dept. of Correctional Servs. (10 NY3d 358, 889 N.E.2d 467, 859 N.Y.S.2d 590 [2008]) the Court of Appeals held

that a PRS term is only valid if judicially [**181] imposed at the time of sentencing, but emphasized that a sentencing court retains the authority to correct a procedural sentencing error, even beyond the one year following conviction afforded the People to seek resentencing under CPL 440.40 (Sparber, 10 NY3d at 469, 471-72; Garner, 10 NY3d at 363 n 4). In response, the Legislature enacted Correction Law § 601-d, providing a procedural frame-work for the identification and resentencing of those defendants whose convictions required a mandatory PRS component that had not been imposed by the sentencing court. In accordance with the new statute, the court resentenced defendant, imposing a five-year term of PRS.

The court clearly acted under the authority granted to it by the Legislature when it enacted Correction Law § 601-d. Accordingly, we reject defendant's arguments that the resentencing exceeded the sentencing court's authority to correct an illegal sentence (see People v DeValle, 94 NY2d 870, 726 N.E.2d 476, 704 N.Y.S.2d 924 [2000]), and that the court lost jurisdiction to resentence defendant.

We further reject defendant's claim that double jeopardy and due process protections rendered his resentencing unconstitutional. Defendant concedes that his resentencing would have been constitutional had it occurred while he was still serving his prison sentence, but argues that the resentencing violated his legitimate expectation of finality since the PRS term imposed by the

Department of Correctional Services was a nullity, since he had completed the only lawfully-imposed portion of his sentence, and since the People's time to seek corrective action by way of an appeal or CPL 440.40 motion had expired. We conclude that defendant had no legitimate expectation of finality with respect to a determinate seven-year sentence with no attending PRS component (see United States v DiFrancesco, 449 U.S. 117, 138-39, 101 S. Ct. 426, 66 L. Ed. 2d 328 [1980]; United States v Rosario, 386 F3d 166, 171 [2nd Cir 2004]; United States v Lundien, 769 F2d 981 [4th Cir 1985], cert. denied 474 U.S. 1064, 106 S. Ct. 815, 88 L. Ed. 2d 789 [1986]).

Clearly, defendant understood that PRS was a component of his sentence, as he had actually served three years of PRS at the time of resentencing. The fact that DOCS-imposed PRS is a nullity does not render it irrelevant to a defendant's expectation of finality. Here, defendant did not merely "expect" to be subject to PRS; he was actually serving such a term, albeit one that was improperly imposed by DOCS instead of the sentencing court. Furthermore, defendant could not have had a legitimate expectation in the finality of a sentence that is manifestly contrary to law. As noted, both the Court of Appeals and the Legislature have determined that failure to impose PRS is a defect that is correctable, notwith-standing the expiration of the [**182] People's time to appeal or move for resentencing. Finally, defendant's resentencing did not offend notions of fundamental fairness, as he was resentenced only to the originally promised

determinate term of seven years, along with the required five-year term of PRS.

PEOPLE V. CRAIG LEWIS
60 A.D.3d 425
March 5, 2009
Appellate Division, First Department

COUNSEL:

Robert S. Dean, Center for Appellate Litigation, New York (Carl S. Kaplan of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Martin J. Foncello of counsel), for respondent.

OPINION:

[**425] Judgment of resentence, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered September 23, 2008, resentencing defendant to a term of 5 years with 5 years' post-release supervision, unanimously affirmed.

After defendant completed his prison sentence and began serving a term of PRS that was improperly imposed in the [**426] absence of an oral pronouncement at sentencing, the court conducted a resentencing proceeding (see Correction Law § 601-d) and properly imposed PRS. We reject defendant's double jeopardy argument, as well as his other challenges to the resentencing (see People v Hernandez, 59 AD3d 180, 872 N.Y.S.2d 455 [2009]).

PEOPLE V. EDWIN RODRIGUEZ
60 A.D.3d 452
March 10, 2009
Appellate Division, First Department

COUNSEL.

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Martin J. Foncello of counsel), for respondent.

OPINION.

[**452] Judgment of resentence, Supreme Court, New York County (Carol Berkman, J.), rendered July 16, 2008, resentencing defendant to a term of 7 years with 5 years' postrelease supervision, unanimously affirmed.

The court properly resentenced defendant pursuant to Correction Law § 601-d to comply with the requirement that PRS be part of the court's oral pronouncement of sentence (see People v Sparber, 10 NY3d 457, 889 N.E.2d 459, 859 N.Y.S.2d 582 [2008]). We reject defendant's arguments that the court lacked authority and jurisdiction to correct his sentence once he completed the prison portion thereof (see People v Hernandez, ___ AD3d ___, 59 A.D.3d 180, 872 N.Y.S.2d 455, 2009 NY Slip Op 631 [February 5, 2009]). Defendant's double jeopardy argument, which is of a type that requires preservation (see People v Gonzalez, 99 NY2d 76, 82-

83, 781 N.E.2d 894, 751 N.Y.S.2d 830 [2002]), and his remaining challenges to the resentencing are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find them without merit (see Hernandez, AD3d, supra). With regard to defendant's argument that the resentencing court had discretion to let stand the original sentence, which unlawfully lacked a provision for PRS, we conclude that Correction Law § 601-d and Penal Law § 70.85, when read together, make clear that a court imposing a resentence pursuant to these enactments has no discretion to omit PRS without the prosecutor's [**453] consent, which was lacking here.

PEOPLE V. DARRELL WILLIAMS
Resentencing Proceedings
June 20, 2008
Supreme Court, New York County (Hon. Bruce Allen)

COUNSEL:

Assistant District Attorney Jeanine Launay

Defense Counsel Mark Zeno

TRANSCRIPT:

COURT CLERK: Added to the 45 calendar, indictment 1242 of 2004, Darrell Williams.

MS. LAUNAY: Jeanine Launay for the People. Good afternoon.

THE COURT: Good afternoon.

MR. ZENO: Mark Zeno for the defendant Darrell Williams.

THE COURT: Good afternoon.

Mr. Williams, Mr. Zeno has filed a memorandum of law on your behalf. I have read it. I have thought a lot about the case since we last spoke. I have made my decision.

I'm afraid you are not going to be in total agreement with my decision, but here it is.

I am going to vacate your sentence and I'm going to resentence you nunc pro tunc to three years in jail and three years of post-release supervision.

The good news, from your standpoint I suppose, is that it will result in your release either tomorrow or by Monday at the latest.

Since it is, I know, over your objection, you can make an appeal. You can challenge what I have done.

I will file a written decision outlining my legal reasons for doing what I'm doing and both sides will get a copy of that decision. You will get a copy of it, too, and you can appeal.

Just to state it briefly, I am relying in large part on the fact that the post-release supervision issue did come up at the plea. In fact, you yourself made reference to it in the course of the plea colloquy.

THE DEFENDANT: I remember the minutes very well.

THE COURT: That makes this case a little different in my view from some of the other cases that the defendant had no knowledge of it. It's true, I didn't say it at sentencing.

THE DEFENDANT: The sentence commitment documents went to D.O.C.

THE COURT: All this will be in the decision and the facts are the facts. But as you will see, there is a line of cases that are holding that judges have certain powers and one of the powers that they have is to rectify an illegal sentence based on errors that the judges themselves made and I'm viewing this one as my mistake that I should have said it and I just didn't. I don't know why I didn't, but I didn't.

The appellate court may disagree. They may agree with some of the arguments that Mr. Zeno has made. If they do, so be it, I accept their judgment, but that's how I have come out of it.

THE DEFENDANT: You are indicating to me upon my release I will still have post-release supervision and report to the P.O. until the appeal comes through?

THE COURT: Right. During the appellate period, you'll be on post-release supervision.

THE DEFENDANT: When will this release be?

THE COURT: It's now Friday and they are going to try to do it quickly. It might happen as early as tomorrow, but I understand that things don't happen so quickly on Rikers Island over the weekend so it may very well not occur until Monday.

Obviously, I have no power over that, but I can guarantee you that it will be no later than Monday. It might be tomorrow.

THE DEFENDANT: I guess I have to accept that.

THE COURT: I know you are not happy. It's a legal issue.

THE DEFENDANT: It's bad news and it's good news.

THE COURT: It's not personal. I am doing what I think the law tells me I should do. The sentence of three years is vacated.

Are both sides ready for resentencing?

MS. LAUNAY: Yes.

MR. ZENO: Yes.

THE COURT: Arraign the defendant for resentence.

COURT CLERK: Mr. Williams, you are before the Court for resentencing following your conviction by plea to the crime of Assault in the Second Degree.

Before sentence, the Court will allow you, your attorney and the district attorney an opportunity to address the Court with any matter relevant to sentence.

From the People?

MS. LAUNDAY: Your Honor, just a minute. Can we approach for one moment?

THE COURT: Yes. Off the record.

(A discussion was held off the record.)

THE COURT: Back on the record.

To clarify the record, Mr. Williams is not being sentenced as a predicate felon. He was not adjudged one and the same non-predicate status is in effect. Thank you for pointing that out, Ms. Launay.

MS. LAUNAY: Nothing further, Your Honor.

MR. ZENO: We rest on our papers with regard to the legality of the proceeding with sentencing.

THE COURT: All right.

Mr. Williams, you get the last word.

THE DEFENDANT: I'll object to the resentence.

THE COURT: All right.

As indicated, your new sentence is three years imprisonment followed by three years of post-release supervision and all of this is to be imposed nunc pro tunc back to the arrest date, which I believe is March 6 of 2001.

I'm signing this order, which says at the end that you should be released forthwith into the community and that's my intent.

If that does not happen, notify us or Mr. Zeno and we will take care of things quickly. You have thirty days to appeal.

THE DEFENDANT: Thank you.

THE COURT: And there was originally a surcharge to be paid. It no longer needs to be paid.

THE DEFENDANT: There was a surcharge?

THE COURT: Forget about it. You don't have to pay it.

THE DEFENDANT: It was paid already.

THE COURT: That's what I thought. Surcharge previously imposed and paid.

MS. LAUNAY: Thank you.

THE COURT: Thank you all.

PEOPLE V. EFRAIN HERNANDEZ
Resentencing Proceeding
October 17, 2008
Supreme Court, New York County (Hon. Michael J. Obus)

COUNSEL:

Assistant District Attorney Robert Hettleman

Defense Counsel Barbara Zolot

TRANSCRIPT:

COURT CLERK: Calendar Number Seven, Efrain Hernandez.

Appearances, please.

MS. ZOLOT: Barbara Zolot, Z-O-L-O-T, Center for Appellate Litigation for Mr. Hernandez.

THE COURT: Good morning.

MR. HETTLEMAN: For the People, Robert Hettleman.

Good morning, your Honor.

THE COURT: Good morning.

I understand there are a couple of other post-release supervision matters that are ready to be called.

I don't know that I want everybody piled into the well here, but because the issues relate to all of them, perhaps the other three can be called.

The defendants can remain where they are seated, but the attorneys can step into the well.

. . .

THE COURT: All right. I did receive memoranda from various lawyers with regard to essentially the same issue having to do with whether or not the Court could lawfully impose a resentence at this point.

I am not going to be filing a written decision, but I am prepared to rule on this matter.

And my statements about it essentially apply to all of these cases, so I thought it would be helpful to do this at least while several of the attorneys are here and any of the defendants in the courtroom who are here for the same purpose can hear the proceedings.

. . .

THE COURT: All right. With regard to the other matters, each of these defendants has had his case on the calendar previously and the matter was

adjourned for the Court to consider whether or not a resentencing would be appropriate in the matter.

I would like to go through some background, so this will take a few minutes.

If you care to sit, you are welcome to do that.

As part of a package of legislation made effective on September 1st of 1998, the State Legislature provided in Penal Law Section 70.45 that "Each determinate sentence also includes, as a part thereof, an additional period of post-release supervision."

In cases in which the defendant has a predicate felony, as two of the three defendants whose cases have been called have, the required period of post-release supervision is five years.

Otherwise there is a range of possible post-release supervision periods, but, again, such a period is by definition a part of every determinate sentence.

At the outset, many courts, including this one, in imposing determinate sentences were not making specific reference at sentencing to the fact that, by statute, each determinate term includes a period of post-release supervision.

Nevertheless, because of the mandatory nature of the statute, the State Department of Correctional Services was calculating all of the determinate sentences as including PRS and the Department of Correctional Services and the

Division of Parole were arranging release plans for each inmate and then parole was supervising all inmates released to post-release supervision under these circumstances.

As this was taking place, several cases were being litigated in which the issue was whether or not the failure of the Court to advise the defendant at the time of the plea of the required period of post-release supervision rendered that plea involuntary.

That issue was finally resolved in 2005 in People v. Catu, 4 NY3d 242, in which the Court of Appeals held that a defendant who was not properly advised that his sentence included a period of post-release supervision was entitled on direct appeal to seek to have his plea vacated.

In the meantime, as this line of cases began to highlight the problem, most courts as of early 2002 were specifically addressing post-release supervision in plea and sentence proceedings so as to avoid exactly that problem.

But by then there was a large group of cases, mostly involving guilty pleas, although not all of them, conducted between 1998 and roughly early 2002 in which the Court had not made specific reference to post-release supervision.

In People v. Sparber, 10 NY3d 457, and its companion cases, the Court of Appeals held that, where the sentencing Court had failed to state the

period of post-release supervision, no such period could be deemed to have been imposed.

And further, although the People's one-year period under CPL Section 440.40 within which to challenge an illegal sentence had expired, the Court determined that the sentencing Court retained authority to correct its own error and that the proper remedy for the Court's failure to state a required period of post-release supervision, absent a motion to withdraw the plea, was to remand for proper resentencing.

The Court did so, even though at least some of the Sparber defendants argued that such resentencing would be unconstitutional so many years after the fact.

I recognize that those cases were on direct appeal.

In the related case of Garner v. New York State Department of Correctional Services, 10 NY3d 358, which was an Article 78 proceeding brought against the department, the Court held that any period of post-release supervision administratively imposed by DOCS was a nullity.

In Garner, the petitioner had been released on such an administratively imposed post-release supervision and was then held on an alleged violation of that supervision.

The Garner Court added in a footnote that its order was without prejudice to any ability that

either the People or the Department of Correctional Services may have to seek the appropriate resentencing of a defendant in the proper forum.

The Court did not address any constitutional arguments that such resentencing would be unlawful and certainly did not hold that resentencing would be improper.

As a result of these decisions, the Legislature quickly passed Correction Law Section 601-d and Penal Law Section 70.85, which provide a procedural mechanism for the Court to be notified of those cases in which the defendant's commitment papers or sentencing minutes, if available, did not reflect the imposition of post-release supervision by the sentencing Court.

And that is how the instant cases and the others on the calendar today are before us at this time.

These cases, like most of the others on the calendar today, are like Garner in that the Court did not specify a period of post-release supervision at sentencing, the defendant completed the initial period of imprisonment and the defendant has been supervised by parole under an administratively imposed period of post-release supervision.

And as I said, as with most of the cases on today's calendar, the required period of post-release supervision is five years in the two cases where the defendant has a predicate felony.

Otherwise the required minimum period is two-and-a-half years.

In essence, the legal issue before the Court is whether, despite the direction of the Court of Appeals in Sparber to resentence defendants in cases in which a period of post-release supervision should have been imposed by the sentencing Court years earlier, and despite the clear statutory basis under Correction Law 601-d for resentencing in these matters, there is a jurisdictional or constitutional impediment to resentencing as a result of the fact that a period of time exceeding the determinate term initially imposed by the sentencing Court has already elapsed.

And the resolution of that issue essentially depends on whether or not at this point a defendant has a legitimate expectation of finality in the sentence as it was initially stated.

I have considered very carefully the helpful memoranda submitted by counsel for several of the defendants and by the People, and I have reviewed all of the authority cited thererin, including the varying opinions of some of my colleagues on this Court.

I recognize that none of the appellate authority arises in identical circumstances to those at bar and I do not intend to review all of the authority cited therein, including the varying opinions of some of my colleagues on this Court.

Certainly as recognized by the United States Supreme Court in United States v. DiFrancesco, 449 US 117, back in 1980, there are circumstances under which a defendant may, under the concept of double jeopardy, have a legitimate expectation of finality in a sentence such that it is no longer subject to being increased by the Court.

I note, however, that in many of the cases upon which the defendants rely, such as, for example, the Fourth Circuit case of United States v. Silver, 90 F.3d 95, the defendant had completed serving a legal sentence and thus could not be resentenced.

There are, to be sure, appellate cases upon which the defendants rely for the proposition that for double jeopardy purposes or due process purposes, a defendant may have a legitimate expectation of finality even in an illegal sentence, but those generally are cases in which the maximum term initially promised and imposed by the Court was, in fact, a legal one.

That was the situation in the Second Circuit case of Stewart v. Scully, 925 F.2d 58, in which the promised indeterminate sentence of ten to twenty years was not a legal one because, by law, the minimum could be no more than one-third of the maximum.

The Court held that, because the defendant had a legitimate expectation of finality in that maximum term, the only constitutional remedy for

this illegal sentence was to reduce the minimum to one-third rather than add to the defendant's lawful maximum punishment.

That was similarly the case in People v. Campanella, 297 AD2d 642, and People v. Trimm, 252 AD2d 673, cited by the defendants.

The circumstances here are different in that the Penal Law statute in effect at the time of the underlying crimes put everyone on notice that every lawful determinate sentence, by definition, included a period of post-release supervision.

Accordingly, all of the sentences at issue here were improperly truncated by the failure to impose such a period. The terms imposed were thus not like the lawful maximum terms imposed in the cases that I just mentioned.

I do understand that at least some of the defendants before me may very well, in fact, not have been aware of the post-release supervision requirement at the time of their sentencing and at the time of their pleas. And that is why under Catu, those who entered guilty pleas would be entitled to move to withdraw their pleas and go to trial, if that was their choice.

I also recognize that in these matters, as I said, the entire term of the sentence as it was stated at the initial sentencing proceeding has elapsed.

But in terms of what the defendants actually expected prior to the expiration of that period, I

think it is relevant that each defendant's sentence was calculated with post-release supervision upon his being taken into the custody of the Department of Correctional Services, each defendant participated in arranging the plan under which he would be supervised by the Division of Parole and each defendant was actually placed on post-release supervision, however incorrectly it was done, for a substantial time before the imposed sentence period had elapsed.

Accordingly, in that sense, these defendants have not been suddenly hauled into court to receive unexpected additional punishment. At worst, they face a continuation of what they must have been anticipating for some time now.

And, finally, I note that the determinate terms of imprisonment, as they are defined in the Penal Law, that is with at least the minimum required period of post-release supervision, would not have expired as of the date of these applications or as of today had they been properly imposed.

Ultimately, while the issue is certainly not a simple one and while I do regret that these matters were not handled better by everyone at the outset, I am satisfied that there is no legal impediment to resentencing.

Under the circumstances of these cases, the defendants cannot be said to have a cognizable expectation of finality in sentences that were deficient in the Court's failure to impose as part of

the sentence the required and, in fact, integral period of post-release supervision.

So I am directing that the defendants be resentenced absent any motions to withdraw their pleas.

In the case of Mr. Hernandez and Mr. Rivera, I understand that they have predicate felonies and that the minimum period, the only period of post-release supervision, is five years.

In the case of Mr. Reyes, the defendant did not have a predicate felony, if I am correct, and the minimum period that would be permitted is two-and-a-half years of post-release supervision which I am prepared to impose.

So, I'm sorry, which of the defendants is sitting before me at the moment?

MR. HETTLEMAN: Hernandez.

THE COURT: Mr. Hernandez.

I will ask that the defendant be arraigned for resentence.

MS. ZOLOT: May I have a minute to discuss the consequences of your decision?

THE COURT: Of course, of course.

(Whereupon, the defendant and defense counsel conferred in open court.)

(Pause in the proceedings.)

...

THE COURT: I'm sorry, counsel, are you ready to proceed?

MS. ZOLOT: Yes.

THE COURT: Would you please arraign the defendant?

COURT CLERK: Efrain Hernandez, you are before the Court for resentencing following your conviction by confession to burglary in the second degree.

Before being sentenced, the District Attorney, your attorney and you yourself may make a statement in regard to the sentence.

Mr. Hettleman?

MR. HETTLEMAN: Your Honor, I have spoken with defense counsel.

This was my case initially and I have informed him that in addition to our obvious agreement with your Honor's decision, we would be prepared to retry the case.

We have verified that the complainant is still available and the defendant was caught on videotape in the complainant's apartment.

This is a burglary case, so we would be prepared to go forward.

We rely on the promised sentence at the time then of seven years and the mandatory five years post-release supervision as he is a predicate.

THE COURT: And counsel?

MS. ZOLOT: We, of course, take exception to your Honor's decision.

I have notified Mr. Hernandez that we will be taking an appeal from it.

He is prepared to stand for resentencing today.

THE COURT: And is there anything that he would like to say at this point?

THE DEFENDANT: No.

THE COURT: All right. Mr. Hernandez, as I said, I regret this wasn't all clarified better when these cases were initially handled, but I believe this is what I'm required to do.

And I understand that you are not seeking to withdraw your plea, although you are entitled to appeal the Court's ruling as to whether you are subject to resentence and counsel will pursue that.

I will resentence you to the original promised sentence of seven years, along with the required period of five years post-release supervision.

And, again, I'll ask that counsel advise Mr. Hernandez of his right to appeal.

There will be a written order to that effect. And if you wait a minute, you will get a copy of it.

Thank you very much.

PEOPLE V. CRAIG LEWIS
Resentencing Proceeding
September 23, 2008
Supreme Court, New York County (Hon. Edward McLaughlin)

COUNSEL:

Assistant District Attorney Ann Schwartz

Defense Counsel Carl Kaplan

TRANSCRIPT:

THE CLERK: Number 13 on the calendar, Craig Lewis. Indictment 6080/2001.

MR. KAPLAN: Good morning, Carl Kaplan, Center For Appellate Litigation for Mr. Lewis.

MS. SCHWARTZ: Ann Schwartz for the People. Good morning.

THE COURT: Good morning. I assume you explained to Mr. Lewis what brings him back today.

MR. KAPLAN: Yes.

THE COURT: Anything you want to say beyond what was said and has been said regarding this topic and Mr. Lewis in particular?

MS. SCHWARTZ: No, Your Honor.

MR KAPLAN: No, Your Honor. Ms. Schwartz filed papers in response to my motion and I filed a reply.

THE COURT: I don't find that there's a double jeopardy violation by imposing what is required to be imposed on Mr. Lewis, notwithstanding the fact that two years has elapsed, approximately two years since the time released from prison, and when he began the admittedly improperly imposed post-release supervision by Department of Correctional Service which should have been done by me.

In view of the nature of the charge and the Legislature's statement that is mandated, I'm imposing five years post-release supervision. I understand he successfully completed two and a half already, and I trust he will be able to complete the remaining two and a half years. I also trust, the way time goes by so fast, that before he knows it, he would be free of us. Please advise him that he can appeal this as well.

MR. KAPLAN: I'll inform him of his right to appeal, and I respectfully disagree for the reasons stated.

THE COURT: It was extremely respectful. There is a paper that you should take and notice that you need to get.

PEOPLE V. EDWIN RODRIGUEZ
Resentencing Proceeding
July 16, 2008
Supreme Court, New York County (Hon. Carol Berkman)

COUNSEL:

Assistant District Attorney Janine Launay

Defense Counsel Richard Siracusa

TRANSCRIPT:

COURT CLERK: Calendar Number 40, Edwin Rodriguez.

MR. SIRACUSA: Richard Siracusa, 299 Broadway, for Edwin Rodriguez.

Your Honor, this is -- we're in the same situation this case as the prior case.

MS. LAUNAY: This case, your Honor, though --

THE COURT: I'm sorry, is Mr. Rodriguez produced?

MR. SIRACUSA: Yes, he is here.

THE COURT: Could we wait for him?

(Pause in the proceedings.)

THE COURT: Actually we're not quite in the same position in this case as we are in the other one.

I was informed on July 2nd that the People are able to retry this case?

MS. LAUNAY: That's correct, your Honor.

THE COURT: The plea minutes, in the plea minutes, I did not advise Mr. Rodriguez of the five years of post-release supervision, which is what the legal sentence is.

And I take it, the People do not consent to my not resentencing the defendant, which is what the new statute seems to contemplate.

So I am perfectly willing to allow him to have the benefit of his original bargain, but with the five years post-release supervision.

MR. SIRACUSA: But there is also --

THE COURT: Or he can go to trial.

MR. SIRACUSA: Your Honor, he'll accept that, but there is also the problem that he also was released after and then violated on post-release supervision.

THE COURT: Mr. Siracusa, I really, you know, I'm really tired of chasing around that little maypole.

As far as I'm concerned, I really have not resolved in my mind what happens to those violations.

Everybody wants nunc pro tunc, but they also want to wipe out the past.

So it was a nullity so far as the actual being on post-release supervision, but they want credit for the time that they weren't on post-release supervision, so this to me is kind of nonsensical.

As Charles Dickens had an expression for that, which I'm not allowed to repeat in court, particularly in front of Mr. DelValle, who is very proper.

MR. SIRACUSA: Your Honor --

THE COURT: So I am not going to say that.

I mean, I'm perfectly willing to give him the nunc pro tunc, but I'm not saying it's a nullity, so he gets credit for the a nullity.

I think there is a song for that. Nothing is nothing means nothing, words to that effect.

(Whereupon, the defendant and defense counsel conferred in open court.)

(Pause in the proceedings.)

THE DEFENDANT: Excuse me, can I speak?

THE COURT: If you wish.

You should understand that everything you say is being taken down by the court reporter and can be used against you.

THE DEFENDANT: Yeah.

Okay. I'm not trying to, you know, come back to court and be resentenced and take my plea and do this and do that.

I did six years on a sentence that you gave me with seven flat.

You never gave me post-release supervision, okay?

I made a mistake and it caused me seven years

You made a mistake and like you said, there is nothing for nothing, right?

All I'm asking is I did my time. I was never sentenced on the post release. I would like to go home, if it's possible.

THE COURT: Mr. Rodriguez, here's the story:

I didn't say what you said. I said but something similar, but, all right, I'm not going to argue with it.

THE DEFENDANT: Okay.

THE COURT: You know, you actually committed a burglary.

That's what you told me, but, you know, I did make a mistake, that is true, that's why you're back here.

I failed to advise you that along with the prison sentence, there is post-release supervision.

And for a violent predicate felony offender, which you are, the post-release supervision is five years.

I don't have a choice. I can't make it less. I can't make it more. It's five years.

I failed to do that. You weren't properly advised on your plea. You're entitled to your plea back, if you want it.

The people have said they are able to go forward and try this case and they are willing to do that, given the seriousness of your record and the seriousness of the crime.

So my mistake means that you're entitled to go to trial now.

The case is probably not as strong now as it was seven years ago, but they say they can try the case.

I don't know. I'm just speculating on whether it is or is not a strong case. I don't know.

MS. LAUNAY: Your Honor, the case is mostly police officers that witnessed the defendant.

The defendant made several statements to the police officers including a full confession after Miranda rights.

The detective is still present at the 9th Precinct.

THE COURT: So that's the story, Mr. Rodriguez.

So, you know, you want for the remedy of my mistake to go home and unfortunately that's not an available remedy for my mistake right now.

THE DEFENDANT: Okay. So . . .

THE COURT: The available remedy is, you can have the original deal with the five years post-release supervision or you can go to trial.

Those are your choices.

Tell Mr. Siracusa what you want to do.

(Whereupon, the defendant and defense counsel conferred in open court.)

(Pause in the proceedings.)

THE COURT: I'm sorry, Mr. Rodriguez, I don't know why you're standing up.

THE DEFENDANT: Okay.

THE COURT: What do you want to do?

THE DEFENDANT: Okay. Give me the time you gave me and give me the post-release supervision and I just go back and finish my time.

THE COURT: Okay. The defendant having previously been adjudicated a violent predicate felony offender on his plea to burglary in the second degree is before the Court for resentence.

I take it, the People have nothing further to say?

MS. LAUNAY: Yes, your Honor.

THE COURT: Mr. Siracusa?

MR. SIRACUSA: No, your Honor, I have nothing further to say.

THE COURT: Mr. Rodriguez, anything else from you?

THE DEFENDANT: No.

I mean, anything I say don't mean nothing, so . . .

THE COURT: I'm sorry, I can't hear you.

THE DEFENDANT: Anything that I say seems like it don't mean nothing, so I'm just going to go with what you tell me.

I will just go back. That's it.

I'm trying to go home.

If I can't go home, then I just got to deal with what you give me and I just go back and finish my time.

I mean, if it was up to me, I would walk out right now, but I can't do that.

You know, that's what I want to do. I've been away for seven years. I made a mistake and I'm paying for it.

THE COURT: The defendant is resentenced nunc pro tunc to the original sentence date to a term of seven years with five years of post-release supervision.

And, of course, the original fees and assessments stand.

Advise him of his rights please, Mr. Siracusa.

MR. SIRACUSA: You have a right to appeal.

If you wish to appeal, you must file an appeal within thirty days.

A notice of information is being handed to you about your appeal.